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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1028

JESSE GREEN IN BEHALF OF HIMSELF AND BESSIE HENDERSON, ALDO THOMPSON, GEORGE BROWN, ET AL.,

Petitioners,

vs.

ANCHOR MILLS COMPANY, A CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

J. F. FLOWERS,
Counsel for Petitioners.

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To the Hon. Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

The plaintiffs instituted this action in the Superior Court of Mecklenburg County, North Carolina, on the 30th day of April, 1943, and thereafter filed a complaint against the defendant seeking to recover overtime compensation, liquidated damage, interest and Attorney's fees under the Fair

Labor Standards Act of 1938, 29 U. S. C. A. 201-219. The case came on for trial at the May Term, 1944, when a jury trial was waived and the Court proceeded to find the facts and rendered judgment thereon, as appears on pages 22 to 30 of the record. It was found as a fact by the Trial Court that Southern Bell Telephone & Telegraph Company occupied about 30% of the entire office space of the building, and that the occupants of much the greater part of the remaining space were engaged in interstate commerce, and that the plaintiffs were engaged as firemen, janitors, cleaners, elevator operators and other service employees of the office building owned by the defendant, and in connection with which the plaintiff and the persons upon whose behalf he prosecuted the action were employed and engaged, and that at the times referred to in the complaint the defendant paid to the plaintiffs a compensation for their services less than the amounts to which they would have been entitled had the defendant complied with the provisions of the Fair Labor Standards Act of 1938. On the 29th day of June, 1944 the Superior Court of Mecklenburg County through Judge William H. Bobbitt rendered judgment denying the plaintiffs' right to recover, and holding that these employees of the defendant's office building were not so related to interstate commerce or interstate communication and transmission as to entitle them to the benefits of the Fair Labor Standards Act, and dismissing this action as of nonsuit. Appeal from this decision was prosecuted to the Fall Term, 1944 of the Supreme Court of the State of North Carolina, which Court heard the said appeal and rendered its judgment on the 13th day of December, 1944, which decision is reported in 224 N. C. page 714, by which decision the judgment of the Superior Court of Mecklenburg County was affirmed.

II

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because a Federal question of substance has been decided by the said Court in a manner contrary to the decisions of the Supreme Court of the United States, or if it be held that the question here presented is different from the one presented in *Kirschbaum* v. *Walling*, 316 U. S. 517, 86 L. Ed. 1638, then the Supreme Court of the State of North Carolina has decided this question in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

III

In the above cited case of *Kirschbaum* v. *Walling*, this Court held that service employees in a loft building "had such a close and immediate tie with the process of production for commerce and were, therefore, so much an essential part of it that the employees are to be regarded as engaged in an occupation necessary to the production of goods for commerce", and the plaintiff and persons upon whose behalf this action is prosecuted had the same relation to interstate commerce as the employees in the *Kirschbaum* v. *Walling* case bore to the production of goods for commerce, and it is pointed out that the statute above cited, and under which the plaintiffs claim their rights provides that "commerce means trade, commerce, transportation, transmission or communication among the several States, etc.", and it is pointed out that the Court found that 30% of the building in question was occupied by Southern Bell Telephone & Telegraph Company (R. 23), and your petitioner contends that service employees of a building occupied and used in communication and transmission is within the purview of the Fair Labor Standards Act as much and as closely

within the same as are the service employees of a building in which goods are produced for interstate commerce.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of the State of North Carolina commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of the State of North Carolina had in the case numbered and entitled on its docket for the Fall Term, 1944, in the Fourteenth District of the said State, being No. 524 of said Fall Term of 1944, and entitled: "Jesse Green on behalf of himself and others against Anchor Mills Company, from Mecklenburg", to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of the Supreme Court of the State of North Carolina be reversed by the Court, and for such other relief as to this Court may seem proper.

This the — day of March, 1945.

JESSE GREEN on Behalf of Himself and Others,
By J. F. FLOWERS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Supreme Court of the State of North Carolina is reported in 224 N. C. Page 714 (R. 31).

Jurisdiction

I

The date of the judgment to be reviewed is December 13, 1944 (R. 41).

II

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 of the Judicial Code as amended by the Act of February 13, 1925.

III

The facts, as set forth in the Petition for Certiorari, are that the plaintiff and persons on behalf of whom he prosecutes this action are elevator operators, firemen, janitors, cleaners and other service employees of the eighteen story office building owned by the defendant, 30% of which is occupied by the Southern Bell Telephone and Telegraph Company engaged in interstate communication and transmission, and a large part of the remainder of the said building is occupied by persons engaged in interstate commerce, and this action is to recover overtime compensation, liquidated damage, interest, etc. under the U. S. statute known as the Fair Labor Standards Act of 1928, 29 USCA 201-219, and the action of the Court below in denying the plaintiffs' recovery under the said Act is contrary to the provisions of the said Act and to the decision of the United States Supreme Court with reference thereto in the case

of *Kirschbaum* v. *Walling*, 316 U. S. 517, 86 L. Ed. 1638 and *Walton* v. *Southern Package Corporation*, 88 L. Ed. 220 (Advance Sheets 88, No. 5). In the *Kirschbaum* case above cited this Court held that service employees, that is to say, persons rendering the same service to a loft building whose tenants were engaged in the production of goods for interstate commerce as the plaintiffs here rendered with reference to interstate communication and interstate commerce, and the Court there held "In our judgment the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore, so much an essential part of it that the employees are to be regarded as engaged in occupation necessary to the production of goods for commerce."

In the case of *Walton* v. *Southern Package Corporation*, 88 L. Ed. 220, the employee there was engaged as a night watchman in a veneering plant in Mississippi, and performed no acts which brought him within the actual duties of making goods and products for commerce, and the State Court of Mississippi denied recovery under the Fair Labor Standards Act, but on appeal to the Supreme Court of the United States the Supreme Court of Mississippi was reversed and recovery was permitted.

We most respectfully submit, therefore, that the plaintiff in this case is as intimately and closely connected with and is as much a part of interstate commerce and interstate communication and transmission as were the employees in the *Kirschbaum* case and the *Mississippi* case, and that therefore, the decision of the North Carolina Supreme Court is in conflict with the decisions of this Court in these two cases.

IV

The cases believed to sustain jurisdiction are the cases above cited of *Kirschbaum* v. *Walling*, 316 U. S. 517, 86 L.

Ed. 1638 and *Walton* v. *Southern Package Corporation*, 88 L. Ed. 220, (Advance Sheets 88, No. 5).

Statement of Case

Statement of the facts and events of this case have heretofore been stated in this Brief and in the Petition, which is hereby attached and made a part hereof.

Specification of Errors

I

The Supreme Court of the State of North Carolina erred in holding that the plaintiff and his associate employees of the defendant as service employees engaged in the defendant's eighteen story office building as firemen, janitors, elevator operators, cleaners and other service employees, 30% of which building was occupied by the Southern Bell Telephone & Telegraph Company engaged in interstate communication and transmission, and a large part of the remainder of the said building occupied by persons engaged in interstate commerce, could not recover under the Fair Labor Standards Act of 1938 and denied the plaintiffs their right under the Federal Statute known as the Fair Labor Standards Act of 1938 hereinbefore cited.

It appears from said petition that there is but one question involved here, and that is whether service employees of an office building 30% of which is occupied by the Telephone Company engaged in interstate communication and transmission and a large part of the remainder occupied by persons, firms and corporations engaged in interstate commerce, are in the same category under the Fair Labor Standards Act of 1938, as are the employees of a loft building wherein goods are manufactured for interstate commerce, as held by *Kirschbaum* v. *Walling*, supra, and a night watchman engaged in a veneering plant where his only

duties were that of watching the plant at night, as held by this Court in *Walton* v. *Southern Package Corporation*, 88 L. Ed., 220.

Your petitioners most respectfully contend that there is no distinction pointed out in that statute, and that under the decision of the Court in *Kirschbaum* and *Walton* cases, these employees of this office building of the defendant here are brought within the purview and are entitled to the protection and benefits of the Fair Labor Standards Act, and that the judgment of the Supreme Court of the State of North Carolina ought to be reversed, and these employees permitted to recover overtime compensation, liquidated damage, interest and Attorney's fees for which they bring this action and as provided by the Fair Labor Standards Act of 1938, being an Act of the Congress of the United States approved on the 25th day of June 1938, in 28 USCA 201-219.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision.

J. F. Flowers,
Counsel for Petitioner.

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Petitioners,

vs.

ANCHOR MILLS COMPANY, A CORPORATION,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

WHITEFORD S. BLAKENEY,
Counsel for Respondent.

GUTHRIE, PIERCE & BLAKENEY,
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ANCHOR MILLS COMPANY, A CORPORATION, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

Reference to Official Report of Opinion to Court Below

The opinion of the Supreme Court of North Carolina which the petitioners are asking this Court to review is officially reported in 224 N. C. 714.

Statement of Grounds on Which Jurisdiction of This Court Is Invoked

It is the respondent's understanding that the petitioners contend that jurisdiction to review and determine this cause is conferred upon this Court by the provisions of 28

U. S. C. A., section 344. The respondent does not question the court's jurisdiction in the matter.

Statement of the Case

As stated in their petition for writ of certiorari, the petitioners are employees who maintain and service an office building, the principal occupants of which are engaged in interstate commerce. The petitioners assert that in such situation, they are entitled to the benefits of the Federal Fair Labor Standards Act of 1938, 29 U. S. C. A., Section 201, *et seq.*, commonly known as the Wage and Hour Law.

The respondent's contention is that the petitioners in such situation are not covered by the provisions of the Act.

Argument

A person is entitled to the benefits of the Fair Labor Standards Act only in case he is an employee engaged:

(1) "In (interstate) commerce"; or

(2) "In the production of goods for (interstate) commerce"—production being broadly defined as hereinafter discussed.

29 U. S. C. A., Sections 206 and 207 and Sections 203(b) and 203(j).

The test under this Statute is not whether the employer is thus engaged, but whether the employee is so engaged—in the particular work which he does.

Kirschbaum v. *Walling*, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638.

McLeod v. *Threlkeld*, 319 U. S. 497, 63 S. Ct. 1248, 87 L. Ed. 1455.

As hereinabove stated, the petitioners were employees engaged in servicing an office building in which interstate commerce was carried on. If goods were produced in such

building, the petitioners (under *Kirschbaum* v. *Walling*, *supra*, and *Walton* v. *Southern Package Corporation*, 88 L. Ed. 220), would be entitled to recover in this action. The petitioners do not claim, however, that any such production exists. The trial court found as a fact that the production of goods is in no way present as an element in this case (R. 35, par. 5).

The classification No. 2 above referred to is, therefore, not involved in this case. The only question to be decided is whether the petitioners in servicing this office building are thereby brought within category No. 1 above mentioned —that is, whether the petitioners in servicing this office building are thereby engaged "in" interstate commerce. Or to state it more completely, the question is whether the petitioners in servicing this office building are engaged "in" interstate commerce because occupants of the building are so engaged.

The trial court and the Supreme Court of North Carolina answered this question in the negative. Numerous other courts including various United States Circuit Courts of Appeal, United States District Courts and State Courts of last resort have answered the same question in the negative. On three separate occasions, this Court has refused to review such decisions denying recovery to persons in the same position as the petitioners.

So far as the respondent has been able to ascertain, and apparently insofar as the petitioners have been able to ascertain, there is no case in which this question has been ultimately answered favorably to the petitioners. The following are the principal cases in which the question here at issue has been decided contrary to the contentions now being made by the petitioners and in favor of the defense now asserted by the respondent. The ruling of these decisions is that although the occupants of an office building

are therein engaged in interstate commerce, persons who service and maintain that building are not thereby engaged in Interstate commerce. Or to phrase the matter differently, servicing an office building is not interstate commerce, nor a part of interstate commerce, simply because interstate commerce is transacted in the building.

Decisions of United States Circuit Courts of Appeal

Johnson v. *Dallas Downtown Development Company*, 132 F. (2d) 287 (C. C. A. 5th). Certiorari denied by this Court, 318 U. S. 790, 87 L. Ed. 1156.

Rosenberg v. *Lorenzetti*, 137 F. (2d) 742 (C. C. A. 9th). Certiorari denied by this Court, 64 S. Ct. 82, 88 L. Ed. —.

Lofther v. *First National Bank of Chicago*, 138 F. (2d) 299 (C. C. A. 7th). (The opinion in this case contains a good summary of some of the leading decisions on the question here at issue.)

Rucker v. *First National Bank of Miami, Oklahoma*, 138 F. (2d) 699 (C. C. A. 10th). (The opinion in this case contains an able discussion of the question at issue.)

Tate v. *Empire Building Corporation*, 135 F. (2d) 743 (C. C. A. 6th).

Cochran v. *Florida National Banking Corporation*, 134 F. (2d) 615 (C. C. A. 5th).

Johnson v. *Masonic Building Company*, 138 F. (2d) 817 (C. C. A. 5th).

Decisions of United States District Courts

Brandell v. *Illinois Bank*, 43 F. Sup. 781 (Ill.).

Johnston v. *Filstow, Inc.*, 43 F. Sup. 930 (Fla.).

Hinkler v. *Maiden Lane Corporation*, 50 F. Sup. 263 (N. Y.).

Wideman v. *Calhoun Realty Company*, 50 F. Sup. 627 (Ga.).

Building Employees Union v. *Trenton Trust Company*, 53 F. Sup. 129 (N. J.).

Decisions of State Courts of Last Resort

Stoikes v. *First National Bank of the City of New York*, 48 N. E. (2d) 482 (N. Y.). Certiorari denied by this Court, 64 S. Ct. 50, 88 L. Ed. —.

Cecil v. *Gradison*, 40 N. E. (2d) 958 (Ohio).

Johnson v. *National Life Insurance Company*, 166 S. W. (2d) 935 (Okla.).

Baum v. *A. C. Office Building*, 143 P. (2d) 317 (Cal.).

Robinson v. *Massachusetts Life Insurance Company*, 158 S. W. 441 (Tenn.).

Such unanimity of judicial opinion surely must be grounded in good sense and reason. It is indeed good reason and common sense that not all of human activity is to be classed as interstate commerce. And if there are still to be any lines of distinction between what is local and what is interstate, then surely in the matter here at hand, the line which has been drawn is a proper one.

In some degree, it is, of course, true that those who service an office building are thereby affecting and contributing to the interstate commerce carried on by the tenants of such building. But in such sense and in some degree, hardly any person can be found who is not affecting and contributing to interstate commerce. The point is that the effective ambit of the statutory phrase "engaged in interstate commerce" should not include, and has not yet been interpreted to include, whatever affects or contributes to that commerce.

This Court, speaking to this very question in applying the Statute now under consideration, says:

> "Our question is whether he was 'engaged in commerce.' We have held that this clause covered every employee *in* the 'channels of interstate commerce,' * * * as distinguished from those who merely *affected* that commerce. * * * The test under this present Act to determine whether an employee is engaged in commerce is *not whether* the employee's activities *affect or directly relate to* interstate commerce, but whether they *are actually in or so closely related to* the movement of the commerce *as to be a part of it.*" (Emphasis supplied.)
>
> *McLeod* v. *Threlkeld*, 319 U. S. 497, 63 S. Ct. 1248, 87 L. Ed. 1544.

Thus the trial court below reasonably and rightly held that:

> "Here the plaintiffs perform no service directly or closely related to the movement of goods in interstate commerce or directly or closely related to any of the interstate business transactions conducted by occupants of the building in and from their several offices. The plaintiffs render local services of accomodation and convenience to persons who are engaged in interstate commerce. The plaintiffs themselves are not so engaged." (R. —.)

The matter is thus summarized by the United States Circuit Court of Appeals for the Tenth Circuit:

> "Whatever may have been the doubts and differences along the way, it now seems fairly plain that the phrase '*engaged in commerce,' when used to measure coverage under the Fair Labor Standards Act, encompasses only employment actually in the 'movement of commerce,' or activities so closely related thereto as to be practically a part of it.* In other words, 'engaged in com-

merce' means engaged in the interstate transportation or movement of commerce." (Emphasis supplied.)

Rucker v. *First National Bank of Miami, Oklahoma*, 138 F. (2d) 699, 705 (C. C. A. 10th).

Apparently the petitioners' only argument is posed in this question: If in a building where production for interstate commerce is carried on, service employees are covered by the Act, then why are service employees not also covered in a building where interstate commerce without production is carried on? The answer is that the wording of the Statute makes the distinction.

The Fair Labor Standards Act provides (29 U. S. C. A., Sections 203(j) and 206, 207) that any occupation "necessary to" the production of goods is covered. There is no similar provision with respect to interstate commerce—absent the element of production of goods. With respect to interstate commerce where production of goods is not present, no provision is to be found that an employee "necessary to" such commerce is covered, but only the provision that an employee "engaged in" such commerce is covered. That the petitioners are not "engaged in" commerce has already been hereinabove discussed upon reasoning and authority.

It might be conceded that the petitioners are "necessary to" interstate commerce, but there is no provision which thereupon brings them within the Statute. The provision is that if "necessary to" production, they are within the Statute. But since no element of production is present, they must be "engaged in" commerce in order to come within the Statute. As has been shown, they are not "engaged in" commerce.

As pointed out by this Court in the recent case of *Armour & Company* v. *Wantock, et al.*, 89 L. Ed. 120:

> "* * * The test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce."

Two recent decisions of the United States Circuit Court of Appeals for the Second Circuit in which this Court has recently granted certiorari and in which office building service and maintenance employees were allowed to recover under the Statute here in question afford the petitioners no comfort. In the first of these, *Borella* v. *Borden Company*, 145 F. (2d) 63 (C. C. A. 2nd), the Court says:

> "* * * It is clear that they (the plaintiffs) are not 'engaged in commerce'."

In the second of these cases, *Callus* v. *10 East 40th Street Building*, 146 F. (2d) 438 (C. C. A. 2nd), the Court again says:

> "They (the plaintiffs) can not effectively contend that they are 'engaged in (interstate) commerce'."

Yet in the instant case, no element of production being present, the petitioners can seek to recover, and do seek to recover, on this ground and this ground alone—that they are "engaged in" commerce. In such position, practical reasoning and all the decided authorities are against them.

Respectfully submitted,

WHITEFORD S. BLAKENEY,
Counsel for the Respondent.

GUTHRIE, PIERCE & BLAKENEY,
Of Counsel.